U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 02 2010

IN RE: Petitioner: [redacted]
Beneficiar

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a non-profit organization. It seeks to employ the beneficiary permanently in the United States as a case manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Permanent Employment Certification (ETA Form 9089) approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of experience stated on the labor certification. Specifically, the director determined that the petitioner failed to demonstrate that the beneficiary possessed five years of experience in the job offered as required by the certified ETA Form 9089 prior to the priority date.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, lines 4, 7 and 9 of the labor certification reflect that a juris doctor in law degree or doctor's degree in human services related field (i.e. law, management, business) or a foreign education equivalent is the minimum level of education required. Line 6 reflects that the proffered position also requires 60 months (five years) of experience in the job offered. Line 8 reflects that the employer/petitioner will accept an alternate combination of education and experience as follows: a master's degree and five years of experience.

The record contains the beneficiary's master of law degree and transcripts from University College London in United Kingdom in November 1990, and master of business administration degree and transcripts from Duquesne University in Pittsburgh in December 2003. Therefore, the beneficiary met the minimum level of education required for the equivalent of an advanced degree, namely a master's degree, for preference visa classification under section 203(b)(2) of the Act prior to the priority date.

However, as previously discussed, to qualify for the second preference classification in this case, the beneficiary must establish that she possessed at least five years of experience in the job offered prior to the priority date as the underlying labor certification specially required. The director determined that the evidence in the record did not establish that the beneficiary possessed five years of experience in the job offered prior to the priority date. On the Form I-290B filed on January 11, 2008, counsel indicated that he would submit his brief and/or additional evidence to the AAO within 30 days. However, to the date, more than two years later, this office has not received any further correspondence for the instant appeal from counsel. The AAO will adjudicate the appeal based on existing evidence in the record.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The petition was filed initially without any documentary evidence to support the beneficiary's qualifying experience. Therefore, the director issued a request for evidence (RFE) on August 7, 2007. The director received the response on September 20, 2007. In response to the director's RFE, counsel submitted two experience letters to establish the beneficiary's qualifications in experience. Both of them are photocopies, one appears a faxed copy, but the other does not indicate that it had been faxed. Counsel did not submit the original copies of these two letters, nor did he explain why only photocopies of these letters were provided.

The first letter is dated September 12, 2007 and signed by [redacted] Assistant Director, [redacted] however, the letter uses the employer's name and address as Housing and Adult Social Services, [redacted] This letter states in pertinent part that:

> I am writing to verify [the beneficiary]'s employment with the [redacted] from January 1997 to January 2001. She was initially second to the Borough by [redacted] in January 1997 and was thereafter retained by the Borough in August 1998. She maintained full time continuous employment with us from 1997 until her resignation in 2001.
>
> During her employment, [the beneficiary] had human resources and management responsibilities including recruitment and training of staff. She worked with at-risk children and families in the child welfare system, and with the juvenile court. She also worked on issues of child abuse and neglect. Her responsibilities included community family services, reviewing and determining that at risk children and families received appropriated services.
>
> [The beneficiary] was initially employed as a Social Worker and progressed to Senior Social Work Practitioner and finally to Manager. ... ...

First of all, this experience letter states that the beneficiary was initially second to the Borough by [redacted] in January 1997 and was thereafter retained by the Borough in August 1998. Therefore, the [redacted] is not in the position to provide verification the beneficiary's work experience from January 1997 to August 1998 with [redacted] The employment experience this letter could verify is only 29 months (two years and five months) from August 1998 to January 2001.

The underlying labor certification specifically requires five years of experience in the job offered and the employer expressly indicates on the line 10 of Part H that experience in an alternate occupation is not acceptable. While the job offered in this matter is a case manager, the experience letter verifies that the beneficiary worked for the [redacted] as a social worker, senior social worker and manger. The letter does not provide detail time frames when the beneficiary served in each of the three positions. Although the letter includes a description of the duties performed by the beneficiary during the employment with this employer [redacted] this letter

does not describe that these duties were performed by the beneficiary during her employment as a social worker, senior social worker or manager.

Further, with three different positions and brief general descriptions of the duties performed by the beneficiary, the AAO cannot determine whether the beneficiary's the entire four years of experience obtained through her employment with the [redacted] from January 1997 to January 2001 as a social worker, senior social worker and manager qualifies her to perform the duties described on Part H, Line 11 of the labor certification, if not all, which part(s) can be used to qualify her for the proffered position.

Moreover, this letter provides inconsistent information regarding the beneficiary's employment with the [redacted] While this letter verifies the beneficiary's employment with this employer from January 1997 to January 2001, on the Form ETA 9089 declared and signed under penalty of perjury that Sections J and K are true and correct on December 7, 2006, the beneficiary stated that she worked for [redacted] as social services from August 1, 1998 to January 30, 2001. The record shows that the beneficiary was registered as a full-time postgraduate student at University College London from October 2, 1989 to September 1990 pursuing her LL.M degree. The record does not contain any reasonable explanation how the beneficiary handled both a full-time studies for LL.M degree and a full-time job at the [redacted] *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain any independent objective evidence to resolve the inconsistency.

In addition, the record does not contain any solid independent evidence to support the content of the letter, including the original copy of the experience letter, any documentary evidence of the former employer's existence and operations, the employer's personnel records or the beneficiary's taxation records showing her income from the employer. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591.

Therefore, the September 12, 2007 letter from the [redacted] alone failed to establish that the beneficiary possessed five years of experience in the job offered prior to the priority date.

The second letter submitted in the record as evidence pertinent to her five years of experience in the job offered in this case is dated September 12, 2007 and signed by [redacted]s Deputy Manager on behalf of [redacted] This letter states that: "[the beneficiary] worked on and off through [redacted] from July 1996 until April 2001" "as a Residential/Community Social Worker with children and families both in their own homes and in community residential settings." This letter does not provide further interpretation of the meaning of language that the beneficiary worked on and off through [redacted] form July 1996 until April 2001. Without detail information

about the exact starting and ending dates of each time "on and off", the AAO cannot count the beneficiary's experience as part of her qualifying experience for the proffered position. This letter does not verify whether the beneficiary worked on a part-time or full-time basis during the period. According to counsel's statement on the Form I-290B, the beneficiary worked an average of 20 hours per week for [redacted]. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The contents of this second verification letter are not supported by the beneficiary's statements on the Form ETA 9089 declared and signed under penalty of perjury that Sections J and K are true and correct on December 7, 2006. The beneficiary did not list his employment on a full-time or part-time basis with [redacted] on the Form ETA 9089. As discussed previously on the first verification letter, the beneficiary was registered as a full-time postgraduate student at University College London from October 2, 1989 to September 1990 pursuing her LL.M degree. It seems impossible for the beneficiary to manage studies as a full-time student for LL.M degree, a full-time job at the [redacted] and a position with [redacted] during the period from October 2, 1989 to September 1990. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The record does not contain regulatory-prescribed evidence to establish the beneficiary's five years of experience in the job offered. Therefore, the petitioner failed to establish that the beneficiary possessed five years of experience in the job offered prior to the priority date, and thus, the beneficiary does not meet the job requirements on the labor certification. For the reason mentioned above, the petition may not be approved.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

> accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on September 14, 2006. The proffered wage as stated on the ETA Form 9089 is $37,000 per year. On the petition, the petitioner claimed to have be established in 1993, to have gross annual income of $786,709, net annual income of $197,504 and 14 employees.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), USCIS will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not submit any documentary evidence such as the beneficiary's W-2 forms or paystubs, showing that the petitioner paid a full or partial proffered wage to the beneficiary during the relevant years. The petitioner failed to establish its ability to pay the proffered wage through examination of wages already paid to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The evidence indicates that the petitioner is a non profit organization. The record contains the petitioner's Form 990 Return of Organization Exempt from Income Tax (Form 990) for 2004. According to the tax return in the record, the petitioner's fiscal year runs from July 1 to June 30. The petitioner's Form 990 return for its fiscal year 2004 (July 1, 2004 to June 30, 2005) is not necessarily dispositive since the priority date falls on September 14, 2006. The petitioner's net income, net current assets or other available funds in its fiscal year of 2004 cannot establish its ability to pay the proffered wage for the year of the priority date of September 14, 2006. The record before the director closed on September 20, 2007 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's Form 990 for its fiscal year of 2006 (July 1, 2006 to June 30, 2007) should have been available. However, the petitioner did not submit its Form 990, annual reports or audited financial statements for 2006, nor did counsel explain why any of these regulatory-prescribed documents for 2006 was not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The annual reports, tax returns or audited financial statements would have

[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

demonstrated the amount of net income or net current assets reveal the petitioner's ability to pay the proffered wage.

The regulation 8 C.F.R. § 204.5(g)(2) specifies evidence of the petitioner's ability to pay the proffered wage shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. The petitioner did not submit any type of evidence enumerated in 8 C.F.R. § 204.5(g)2. Therefore, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary the full proffered wage in 2006 and thereafter.

Therefore, from the date the ETA Form 9089 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date to the present through an examination of wages paid to the beneficiary, its net income or its net current assets.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.